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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

OWEN H. BROOKS, *et al.*, *Appellants*,

v.

WILLIAM F. WINTER, Governor, *et al.*,
Appellees/Cross-Appellants.

On Appeal From The United States District Court For The Northern District Of Mississippi

MOTION TO DISMISS OR AFFIRM

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**On Appeal From The United States District Court
For The Northern District Of Mississippi**

MOTION TO DISMISS OR AFFIRM

Appellees in the above-entitled case move to dismiss or affirm on the grounds that the questions presented are so unsubstantial as not to need further argument.[1]

STATEMENT OF THE CASE

In August, 1981, the Legislature of the State of Mississippi enacted S.B. 2001, 1981 Mississippi Laws, Extraordinary Session, Chapter 8, to achieve population equality among Mississippi's Five Congressional districts, based on the 1980 Census data. Two facts regarding the enactment of S.B. 2001, omitted from the Appellants'

[1] This Motion is filed on behalf of Appellees/Cross-Appellants, William F. Winter, Governor; William A. Allain, Attorney General; and Edwin Lloyd Pittman, Secretary of State; in their official capacities as members of the Mississippi State Board of Election Commissioners.

Jurisdictional Statement, are essential to an understanding of the State's position. First, the State through the Joint Senate-House Committee for Congressional Redistricting (Miss. Code Ann. §§ 5-3-121, *et seq.* (Supp. 1981)) drafted, discussed, and ultimately enacted S.B. 2001 in the full view of the invited news media and public. The legislative process began with a series of out-reach hearings intended to inform the Committee of the views of the citizenry. All committee meetings were open and all files and records were continually available for inspection. Public participation was solicited and encouraged and the openness of the process as compared to other states, or indeed to any standard, was extraordinary.

Secondly, the State leadership embarked on its redistricting mission with the expressed goal of complying with Constitutional and statutory standards. The Redistricting Committee retained special outside counsel to advise members and staff of federal requirements. With the advice of counsel, the Committee relied in good faith on the fact that the existing district lines had the imprimatur of the Supreme Court and the Attorney General. The same district configuration was the subject of a constitutional challenge in 1966. The district court upheld the plan and the Supreme Court affirmed. *Connor v. Johnson*, 279 F.Supp. 619 (S.D. Miss. 1966), *aff'd* 386 U.S. 483 (1967). The 1972 plan, (Miss. Code Ann. § 23-5-233 (1972)), re-enacted the 1966 lines with slight adjustments to accommodate population shifts and the Attorney General precleared the State's submission under Section 5 of the Voting Rights Act. (Letter of David Norman to A.F. Summer, May 30, 1972 at Appendix A.)[2]

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[2] The Appellants have challenged the conclusiveness of the 1972 preclearance and this is one of the central disputes in the Section 5 litigation. The Appellants contend that because the Attorney Gener-

These prior determinations of validity under the Fourteenth and Fifteenth Amendments and the Voting Rights Act guided the Committee and the Legislature and were

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al deferred to the ruling of the district court in *Connor* v. *Johnson*, 279 F. Supp. 216 (S.D. Miss. 1966), he neglected his statutory duty to undertake an independent review of the 1972 plan and consequently his preclearance is now retractable.

In *Morris* v. *Gressette*, 432 U.S. 491 (1977), however this Court stated categorically that the Attorney General's reasons for objection or approval are immaterial to the efficacy of a preclearance once 60 days has elapsed:

> According to the terms of § 5, a covered jurisdiction is in compliance . . . once it has (i) filed a complete submission with the Attorney General, and (ii) received no objection from that office within 60 days . . . [I]mplementation of changes in voting laws is not conditioned on an affirmative statement by the Attorney General that the change is without discriminatory purpose or effect. To the contrary, compliance with § 5 is measured solely by the *absence*, for whatever reason of a timely objection on the part of the Attorney General.

432 U.S. 491, 503 (1977) (emphasis in original and footnotes omitted).

The appellants further argued that the Attorney General misunderstood the law. The Attorney General thought he was required to defer to federal court decisions, while in fact, as *Connor* v. *Waller*, 421 U.S. 656 (1975), made clear, the Attorney General is not bound by a district court's decision on constitutionality. In the view of the *Morris* Court, this did not add any weight to the appellants position:

> The record is clear that the Attorney General reviewed the submitted legislation as well as the judicial determination in *Twiggs* v. *West*, and *decided* not to interpose an objection . . . That decision may have been erroneous . . . but it nonetheless was a decision exercised pursuant to the Attorney General's § 5 responsibilities.

432 U.S. at 507 n.24. *Accord*, *Dotson* v. *City of Indianola*, 521 F. Supp. 934, 941-43 (N.D. Miss. 1981).

Apparently, the Attorney General's policy of deferring to district court determinations of constitutionality was applied to Mississippi in 1972; at least this was the reason stated by Assistant Attorney General Norman. Whether it was the true motivation behind the

certainly the single most compelling reason for the "least changes" approach which was ultimately embodied in S.B. 2001. Appellants' contention that S.B. 2001 "is rooted in purposeful discrimination" is factually inaccurate. (Jurisdictional Statement, at 16.) The roots of S.B. 2001 lie in purposeful maintenance of *proven* compliance with federal requirements. It is precisely because Section 5 purports to scrutinize *change* in voting standards, practice, or procedures that the Legislature took the conservative approach of *least* change from the existing districts, rather than risk an inadvertent mistake in some unchartered region.

Having acted diligently and in good faith in conforming its legislative actions to the requirements of the Voting Rights Act, the State's only omission was a failure to retain a medium to predict the whimsical changes in the Department of Justice's administration of Section 5 which resulted in the Attorney General's objection to S.B. 2001. J.S. App. 27a.

When the objection letter of Assistant Attorney General Reynolds was received, the State leadership decided to litigate the validity of the Legislature's plan. An action for declaractory judgment was filed in the District Court for the District of Columbia on April 7, 1982. *Mississippi* v. *Smith*, Civil No. 82-0956 (D.D.C.) The State has noticed an interlocutory appeal to this Court from the

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failure to object or whether some other political exigencies influenced the decision is inapposite. The relevant facts are that the state staisfied its obligation of submission and no objection was interposed. For whatever reason no objection was made in 1972, the issue of the plan's validity under Section 5 was finally decided 60 days after submission.

three-judge court's denial of their motion for Summary Judgment.[3]

It is this background of the State's good faith and the pending Section 5 litigation which distinguishes *Upham* v. *Seamon*, ____ U.S. ____ (1982), and renders the Appellants' questions unsubstantial.

THE APPEAL PRESENTS NO SUBSTANTIAL QUESTION

I. The Primary Election Conducted Under The Interim Plan Refutes Many Of The Appellants' Factual Allegations

The unsubstantiality of the questions presented by the Appellants' appeal has been dramatically exposed by the primary elections conducted under the district court's interim plan. The Appellants contend that the court-ordered interim "Simpson" plan which contains a 53.7% black district, denies black voters an opportunity to elect candidates of their choice insofar as it allegedly would require a Congressional district with a black majority of at least 65% to elect a black.[4] In the August 17, 1982 primary, Robert Clark, a black State Legislator, won the Democratic Congressional nomination in the Second District over three white candidates. Mr. Clark carried over 57% of the votes cast—more than the number of votes

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[3] The standards to be applied in judging a redistricting plan's compliance with the "effect" test under Section 5 constitutes the subject matter of the State's appeal to this Court in *Mississippi* v. *Smith*, Civil No. 82-0956 (D.D.C. June 28, 1982), to be docketed on or before September 27, 1982. The opinion of the district court for the District of Columbia is at J.S. App. 31a.

[4] All of the witnesses for appellants, including their expert, Senator Kirksey, testified that the Simpson plan did not provide an opportunity to elect a black Congressman. Tr. 91, 109, 272.

received by the other candidates combined.[5] Moreover, the State's Senior United States Senator, John Stennis, the incumbent Second District Congressman, David Bowen, the Governor and other state and party leaders have publicly endorsed Mr. Clark for the November election. These results are entirely irreconcilable with the Appellants' contentions that strict racial bloc voting and lack of party support for black candidates prevail in Mississippi.

The primary result in the Second District also discredits the Appellants' statement that the Legislature preference for two impact districts was discriminatory *per se*, because it allegedly precluded election of a black Congressman. (J.S. at 24-5). The impact theory, as embodied in the Simpson plan, provides an opportunity to elect a black Congressman from District 2 without sacrificing the political effectiveness of blacks in District 4.

In addition, the Simpson plan guarantees responsive representation of the black voters in Districts 2 and 4, whatever the outcome of the November elections, because of the built-in symbiosis between accountability to the black electorate and re-election. Mr. Clark's primary victory demonstrates that a district with a black voting age population under 50%, J.S. at 6 n. 4, can elect a black, which accomplishes the goal sought by the Appellants

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[5] The vote tally as reported in the Jackson *Clarion-Ledger*, August 18, 1982, at 1, was as follows:

Democrats:	Robert Clark	36,257
	Pete Johnson	14,298
	Ollie Mohamed	8,802
	Ed Jackson	4,463
Republicans:	Webb Franklin	7,124
	Clennon King	90

without their repugnant gerrymander and without sacrifice of black political power in another district.

II. The District Court Properly Exercised Its Remedial Authority Within The Boundaries Defined by Upham

This Court's decision last term *Upham* v. *Seamon*, ___ U.S. ___ (1982), reiterated established principles which should guide district courts in fashioning interim relief in redistricting cases. Consistent with precedents, *Upham* states that the courts' exercise of remedial power must be circumscribed by specific constitutional or statutory infirmities. *White* v. *Weiser*, 412 U.S 783 (1973); *Whitcomb* v. *Chavis*, 403 U.S. 124 (1971); *Sixty-Seventh Minnesota State Senate* v. *Beens*, 405 U.S. 187 (1972). The judiciary can substitute neither its own, nor a plaintiff's constitutionally superfluous preferences for those of the Legislature. Any state policy, consitutionally and statutorily legitimate, must be respected by the district court.

The plaintiffs below sought not only the reestablishment of a Delta district, but one gerrymandered to recapture lost black population. To justify this remedy they attempted to prove the constitutional deficiency of the basic configuration of S.B. 2001 first adopted in 1966, and the statutory deficiency of S.B. 2001, based on the objection interposed by the Attorney General earlier this year.

A. The doctrine of res judicata precludes the relitigation of the constitutionality of the 1966 configuration

The dispute as to the constitutional validity of the basic configuration of S.B. 2001 was finally adjudicated in *Connor* v. *Johnson*, 279 F.Supp. 620 (S.D. Miss. 1966), *aff'd*, 386 U.S. 483 (1967). In that case, the same parties litigated the issue of whether the east-west lines across the Delta violated the Fourteenth and Fifteenth Amend-

ments. The district court concluded that the plaintiffs had failed to prove either the intent or effect of racial discrimination. 279 F.Supp. at 623-24. On appeal to this Court the same question was squarely presented:

> Whether the congressional district lines drawn by the 1966 session of the Mississippi legislature, which deliberately or otherwise, have a racially discriminatory effect, violate the Fourteenth and Fifteenth Amendments to the Constitution.

Connor v. *Johnson*, Jurisdictional Statement, at p. 2, Tr. Exhibit C-1, Binder 5, Attachment V.

Recently in *Federated Department Stores, Inc.* v. *Moitie*, 452 U.S. 394 (1981), this Court wrote:

> "There is simply no principle of law or equity which sanctions the rejection by a federal court of the salutory principle of res judicata."

452 U.S. at 396.

The *Connor* decision forever settled between the parties the issue of whether there was a constitutional obligation to draw a Delta district in the 1966 Congressional redistricting plan. The Appellants cannot relitigate that case nor can they retry the same issue as it relates to S.B. 2001. Under the companion doctrine of collateral estoppel, "the judgment in a prior suit precludes relitigation of issues actually litigated and necessary to the outcome of the first action." *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 326 n. 6 (1979). Thus, the court below did not and could not have concluded that there was a constitutional obligation to incorporate a Delta district in the 1980 redistricting. Constitutional justification for the relief sought was wholly lacking from the Appellants' case.

B. No adjudicated violation of the Voting Rights Act precluded the court's deference to the state policy of maintaining two impact districts

The Appellants incorrectly rely on *Upham* for the proposition that the district court failed to rectify those aspects of state policy which gave rise to the objection to S.B. 2001. In *Upham* the Texas Legislature accepted the Attorney General's objection letter as the final determination of the validity of the plan in question under Section 5. That letter constituted the final adjudication of Section 5 compliance. The Texas district court, therefore, was bound to specifically address the deficiencies identified therein.

In the present case, however the State decided to pursue a declaratory judgment as to S.B. 2001 in the District Court for the District of Columbia. *Mississippi v. Smith*, Civil No. 82-0956 (D.D.C.). That action was pending at the time the court below entered its order. Thus no violation of the Voting Rights Act has ever been adjudicated and the statutory validity of S.B. 2001 remains undetermined.

In deciding what, if any, interim relief was appropriate the district court was faced with a choice between the nondispositive letter of the Attorney General and the overwhelming evidence that the Legislature had acted in complete good faith in enacting S.B. 2001. To adopt the Attorney General's preliminary findings would have denied the State its statutory right to a full and fair adjudication of the plan's conformance to the requirements of the Voting Rights Act. Moreover, the objection was based on an arbitrary legal standard of which the State had no advance notice. The Attorney General's first notice to any covered jurisdictions that discriminatory effect could be measured against some benchmark other

than existing voting strength came 60 days after Mississippi's submission of S.B. 2001.[6] Letter of William Bradford Reynolds, January 11, 1982, at Appendix B. Further adding to the district court's dilemma was the fact that the alleged racial policy to which the Appellants and the Attorney General objected had been precleared by the Attorney General in 1972.

On the other hand, the State's evidence showed that the Legislature had endeavored to comply with the procedural and substantiave requirements of Section 5. In the light of the State's unassailable good faith, there was no compelling reason to disrupt its long-standing political program to the degree proposed by the Kirksey plan. The Attorney General's position on S.B. 2001, by virtue of its uncertainty, inconsistency and structural weakness, argues *against* interference with the Legislature's plan prior to a trial de novo in the Section 5 court.

III. No Racial Minority Group Has A Constitutional Or Statutory Right To A 65% District.

At the foundation of the Appellants' appeal lies the contention that the black citizens of Mississippi have a constitutional right and a statutory entitlement to a 65% black Congressional district. The Appellants seem to argue that since the Constitution and Voting Rights Act guarantee minority voters an opportunity to elect candidates of their choice, and since, according to their reckoning, it would require black majority of at least 65% to

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[6] On January 11, 1982, Counsel for the State received a letter requesting information regarding redistrictings prior to the 1972 preclearance. None of the requested information is required by the regulations describing the contents of Section 5 submissions. *See* 28 C.F.R. §§ 51.25, *et seq.*

actually elect a black Congressman, the Constitution and Voting Rights Act guarantee black voters a 65% district.

However, guaranteed safe seats for racial minorities are simply not the law. The Fifteenth Amendment does not entail the right to have Negro candidates elected. *City of Mobile* v. *Bolden*, 446 U.S. 55, 59 (1980). The Constitution and the Voting Rights Act do guarantee that black citizens will have equal access to the political process and an equal opportunity to elect candidates of their choice. *City of Mobile*, 446 U.S. at 59; *White* v. *Regester*, 412 U.S. 753, 776 (1973). While the law prohibits measures or practices which "cancel out or minimize the voting strength of racial groups," *White* v. *Regester*, 412 U.S. at 765, it does not ensure any group a right to be represented in proportion to their numbers. *City of Mobile*, 446 U.S. at 59.

In *Mississippi* v. *United States*, the District of Columbia Court reached this conclusion of law:

> "No state or political subdivision is required to search for ways to maximize the number of black voting age population districts. Likewise, no racial group has a constitutional right to an apportionment structure designed to maximize its political strength."

490 F.Supp. 569, 582 (D.D.C. 1979), *aff'd*, 444 U.S. 1050 (1980). The Constitution and Voting Rights Act guarantees opportunity and access, not guaranteed efficacious results.

Just as there is no basis in the law to support the Appellants' claim for a 65% district, neither is there any justification in demographic fact. Both the 1970 and 1980 census reports show a decreased population in the Delta and a decline in the percentage of the total Delta population comprised of blacks. The Delta District, which was 59.29% black in 1960 is only 48.09% black today. J.S. App.

15a. The Delta district is a phantom and this is nowhere more clearly illustrated than in the Kirksey plans proposed to the district court. These maps reach far beyond the Delta area, the geographical integrity of which their proponents claim to preserve, into the urban population of Jackson in order to bolster the black electoral base of District 2. The Kirksey proposals are blatant racial gerrymanders which seek to maximize the electoral strength of black voters in contravention of the Court's pronouncements on this topic. *Beer* v. *United States*, 427 U.S. 130 (1976); *City of Richmond* v. *United States*, 422 U.S. 1 (1975); *Whitcomb* v. *Chavis*, 403 U.S. 124 (1971). The Legislature validly rejected this gerrymander and there was no constitutional or statutory compulsion on the district court to accept it either.

CONCLUSION

Wherefore, Appellees respectfully submit that the questions upon which this cause depends are so unsubstantial as not to need further argument, and therefore

move the Court to dismiss this appeal, or, in the alternative, to affirm the judgment entered by the District Court for the Northern District of Mississippi.

Respectfully submitted,

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APPENDIX A

MAY 30 1972

Honorable A. F. Summer
Attorney General
State of Mississippi
The State Capitol Building
Jackson, Mississippi 39201

Dear Mr. Attorney General;

This is in response to your submission, on behalf of the State of Mississippi, of House Bill 448, the recently passed reapportionment of Mississippi's five Congressional seats. This submission was made pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c.

The Attorney General will not object to House Bill 448. The basis of this decision is our reading of *Connor* v. *Johnson*, 279 F. Supp. 620 (U.S. Miss. 1966). *affirmed*, 386 U.S. 483 (1967), in which it appears that the courts considered the Fifteenth Amendment implications of a similar Congressional redistricting plan in Mississippi and ruled in favor of the state. Because we feel bound by the decisions of the courts in that case, we do not interpose an objection.

We trust that you are aware that, as Section 5 provides, our present failure to object does not bar future litigation regarding House Bill 448's Fifteenth Amendment implications before the courts. Nor should this letter be construed as an approval of the one person, one vote implications of House Bill 448, under *Kirkpatrick* v. *Preisler*, 394 U.S. 526 (1969), because the Attorney General does not have jurisdiction under Section 5 to determine such issues.

Sincerely,

DAVID L. NORMAM
Assistant Attorney General
Civil Rights Division

APPENDIX B

U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General

Washington, D.C. 20530

January 11, 1982

Jerris Leonard, Esquire
Jerris Leonard & Associates
Suite 1020
900 Seventh Street, N.W.
Washington, D. C. 20006

Dear Mr. Leonard:

This is in reference to Senate Bill No. 2001 (1981), providing for the reapportionment of the Mississippi Congressional districts, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended. Your submission was received on November 10, 1981.

We have given careful consideration to all of the forwarded materials as well as to other information available to us. In the course of our evaluation, we found it necessary to focus once again on the State's reapportionment of 1966 which adopted a district configuration that fragmented the Mississippi Delta area into three districts. As you know, that 1966 plan was never submitted for Section 5 preclearance. However, a federal district court, in a constitutional challenge to the plan, sustained it on the ground that plaintiffs had failed to carry their burden of proving purposeful discrimination pursuant to the Fifteenth Amendment. *Connor* v. *Johnson*, 270 F. Supp. 619 (S.D. Miss. 1966), aff'd, 386 U.S. 483 (1967).

When the State reapportioned in 1972, following the 1970 Census, the State submitted the 1972 plan to the Attorney General pursuant to Section 5. That plan essentially followed adopted in 1966. The Attorney General determined, based on

the then prevailing decisional law (*Connor* v. *Johnson*, 402 U.S. 690, 691 (1971)) that he was bound by the district court's earlier Connor decision to preclear the 1972 plan without undertaking an independent evaluation of it to determine whether it satisfied Section 5 requirements.

Subsequent decisions of the United States Supreme Court have made it clear that any reapportionment plan enacted by a covered state must be subject to an independent review under Section 5 without regard to whatever judicial scrutiny that plan may undergo. See *Connor* v. *Waller*, 421 U.S. 656 (1975); *Connor* v. *Finch*, 431 U.S. 407 (1977); *McDaniel* v. *Sanchez*, Sup. Ct. No. 80-180, decided June 1, 1981. Consequently, were we to cosider the 1972 plan today we would be compelled to review that plan on its merits under the purpose/effect standard of Section 5 rather than forego that analysis in deference to the district court's 1966 decision.

This raises the troublesome question with regard to the present submission as to whether the proper comparison is with the State reapportionment in 1972, which has never been tested under Section 5, with the State reapportionment in 1966, which also has never been tested under Section 5, or with the pre-1966 State reapportionment, which was in effect at the time the Voting Rights Act was adopted. In order to resolve this question in a meaningful way and on a fully informed basis, it is necessary that we receive from you additional information regarding you submission. Specifically, we request, as I discussed with you today by telephone; that you provide us with an analysis of the district or districts in the Delat area as configured in 1965, in 1966 after reapportionment, and in 1972 after reapportionment, including population statistics as determined by the 1960 Census, the 1970 Census and the 1980 Census.

As soon as this information is provided to use we will undertake to complete our assessment of the current submission on

an expedited basis and will meet with you promptly to discuss the analysis provided.

Sincerely,

/s/ Wm. Bradford Reynolds
WM. BRADFORD REYNOLDS
Assistant Attorney General
Civil Rights Division